***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

ORIGINAL

To Be Argued By
GRETCHEN WHITE OBERMAN

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

# 74-1398

UNITED STATES OF AMERICA,

Appellee,

-against-

CARMINE TRAMUNTI,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA,

Appellee,

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CARMINE TRAMUNTI,

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---

# BRIEF FOR APPELLANT

## QUESTIONS PRESENTED

1. Whether the verdict must be set aside on the ground that compelled testimony previously given by appellant under a grant of immunity was used by the prosecution at the trial below in violation of appellant's constitutional and statutory rights?

2. Whether the convictions must be reversed on the ground that the proceeding below was barred on the doctrine of collateral estoppel?

3. Whether count four of the indictment should have been dismissed for insufficiency of the evidence?

4. Whether the verdict must be set aside on the

ground that the Government's use of one witness who identified appellant and its failure to disclose that two other witnesses interviewed in the same circumstances failed to identify him, violated due process of law?

5. Whether the court below erred in permitting the Government to improperly vouch for the credibility of its witnesses?

## STATEMENT PURSUANT TO RULE 28(3)

### (a) Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Bauman, D.J.), convicting appellant, after jury trial, of six counts of making false declarations (18 U.S.C. §1623) and sentencing him, on February 27, 1974, to a five year term of imprisonment. Prior to trial a motion to dismiss the indictment on the ground of double jeopardy and collateral estoppel was made and was denied by the trial court on July 26, 1973.* After verdict a Rule 33 motion was made and was denied on the day of sentence.

*A writ of prohibition was sought to compell dismissal of the indictment on this ground and was denied in this Court on August 24, 1973, without opinion. The Court also denied a motion directing the Government to file the record of the first trial on that same day. No opinion was written on either motion. A petition for certiorari to review these orders was denied by the United States Supreme Court.

(b) Statement of Facts

The indictment alleged that the appellant lied in seven respects when he appeared as a witness in his own behalf on trial of Ind. 70 Cr. 967, charging him with conspiracy, stock fraud and mail fraud and where he was acquitted after jury trial.

The indictment below* alleged that appellant lied when he denied being at a meeting with other alleged co-conspirators at Gatsby's restaurant where the Imperial stock fraud deal was reviewed and approved (count 6); when he denied knowing Michael Hellerman, John Kelsey, Murray Taylor, Vincent Gugliaro, Philip Bonodono, all of whom allegedly were co-conspirators present at the Gatsby's meeting (counts 1-5); and when he denied that he had met or spoken with Kelsey and Hellerman at the Americana Hotel (count 7).** The pre-trial collateral estoppel-double jeopardy motion was based on the claim that these same issues had been litigated at the Imperial trial and decided adversely to the Government, the defendant having been acquitted

*Before the trial commenced, defense counsel objected to the manner in which the indictment was framed on the ground it implied appellant was implicated in the stock fraud case. He asked to be permitted to prove the prior acquittal in order to counteract this prejudice. Rather than permitting proof of the acquittal, the court redacted the indictment to remove any indication that appellant appeared as a defendant in the prior trial. The indictment as redacted was read to the jury by the trial court and appears in the appellant's Appendix at 155a. The original indictment appears at 2a.

**Count 7 was dismissed by the district court on July 26, 1973.

by jury verdict. Since the collateral estoppel issue is pressed on this appeal, a short statement of the testimony, summation and charge at the Imperial trial is here included.

(1) The issues and proof at the Imperial Trial

Only two Government witnesses, John Kelsey and Murray Taylor,* testified to implicate appellant in the Imperial fraud.

After the Imperial manipulation got under way, it became necessary to hold a "sit-down" "where the deal is reviewed and approved." (Ex. 92)** This meeting was held at Gatsby's restaurant with the following persons present: Dioguardi, appellant, possibly Hellerman, Kelsey, Gugliaro and Bonodono. (Ex. 95)

Both Kelsey and Taylor testified about the Gatsby's meeting. Kelsey stated that Hellerman was out of town and he had gone as Hellerman's representative. Taylor explained the deal and asked for $50,000 front money, but Dioguardi refused to approve it until Hellerman returned. According to Kelsey, appellant did not say much, but nodded his head a few times when he asked questions Kelsey did not testify that Gugliaro was present at the meeting.

Taylor testified that Hellerman and Gugliaro were present at the meeting and that appellant was the man who refused to approve the front money.

---

*Michael Hellerman was not called by the Government in order to prevent disclosure that Hellerman was cooperating with the Government.

**References to the Imperial trial are designated 'Ex ; references to the Appendix are designated ' a' and references to the trial transcript below are designated 'TR .'

Kelsey also testified that he met appellant a second time. He, Hellerman and their wives were at the Americana Hotel for a show and Hellerman sent liquor to appellant's table. Appellant came over to their table to thank Hellerman for the liquor. Mrs. Kelsey testified but could not identify appellant as the man she saw at the Americana.

The Government also introduced, through an F.B.I. agent, a picture of appellant and Gugliaro leaving a catering hall in Brooklyn five years before trial, to show that the two men knew one another. (See infra, p. 15)

Appellant took the stand in his own behalf and denied being at the Gatsby meeting. He also denied knowing Hellerman, Kelsey, Taylor, Gugliaro and Bonodono, or going to the Hellerman-Kelsey table at the Americana Hotel.

In summation, the Government argued that the jury should find, on the evidence in this case,

> "...that a number of these defendants got on the stand and categorically lied to you, lied to you..." (Ex. 6842)

The Government argued that the best evidence that the Gatsby meeting took place was:

> "Because a lot of people who were supposed to be there have said they weren't.
>
> "Mr. Tramunti tells you he wasn't there. Mr. Aloi tells you he wasn't there. And Mr. Gugliaro tells you that wasn't the time he took the lighters back. He wasn't there.
>
> "How do you know the meeting took place? These guys, they are liars, they testified falsely before you..." (Ex. 6896-97)

The Government argued that Kelsey was able to identify appellant as the man he saw at Gatsby's because he also saw him at the Americana, and that Mrs. Kelsey corroborated her husband because she testified she remembered the incident even though she could not identify appellant. (Ex. 6910) The Government stated that appellant, of course, denied seeing Hellerman and Kelsey, but

> "How do you think Kelsey can identify Tramunti in this courtroom if he didn't see the man, if he didn't meet the man?"

The Government's position was that appellant's guilt was proved on the basis of the Gatsby meeting because at that meeting "they talked about the money." (Ex. 6900):

> "They don't talk about the details of what brokers or how can you do this or how long it will take. They talk about how much money they are going to take home. That's what Tramunti was interested in... And the figure came out $1,400,000. Not bad. Not bad for one meeting.
>
> "They say to you what did Mr. Tramunti do to participate in the conspiracy. Rarely, rarely in any conspiracy case do you have actual proof that people sat down and talked about doing it, because that is all it is, agreeing to commit the crime. Participation at that meeting, ladies and gentlemen, is more than enough." (Ex. 6901)

According to the Government, the F.B.I. picture of appellant and Gugliaro proved they lied when they denied knowing not only each other but the other conspirators. (Ex. 6941-42) The Government stated that if they were lying, it was only for one reason -- "because they are guilty of the charges in this case." (Ex. 6942)

At the outset of the charge, the trial court told the

jury that the question was:

> "...whether you believe the witnesses and the testimony and the evidence, and, if so, what you believe.
>
> "You can't believe it all...There are some conflicts of testimony...which...are irreconcilable and you will have to choose between witnesses to determine the case and its outcome." (Ex. 6969)

After charging that the jury first had to find whether the conspiracy existed, the court instructed that participation of any co-conspirator "is not measured by the extent or duration of his participation..." (Ex. 7005)

In regard to the various meetings alleged in the indictment, the court charged:

> "Now obviously, for persons to be present at a particular location, for example, is not in itself criminal conduct. But when, as the Government or the indictment charges, and you find, the reason for that presence at a particular location was for the purpose of violating the law, then the act loses its innocent character." (Ex. 7008)

The court summarized the contentions of the Government and each defendant. As to appellant, the Government contended that appellant was the head of the Dioguardi, Hellerman, Taylor group and represented them at the Gatsby meeting. (Ex. 7041) Appellant contended that there was no evidence showing his connection to any part of the conspiracy, except the Gatsby meeting, and that his denial, on the stand, that he attended the meeting rebutted the Taylor-Kelsey evidence. (Ex. 7042) He further contended that Taylor and Kelsey were not worthy of belief because their accounts of the meeting were in conflict and because they were admitted liars and perjurers, who fabricated their stories

to curry favor with the Government. (Ex. 7043)

The court concluded the charge by instructing the jury at great length on the issue of credibility. (Ex. 7052-59) The court stated that the credibility issue was especially important since

> "...I earlier stated that I think some of the testimony in this case involves conflicts that are irreconcilable, so you will have to decide that one man was telling the truth and another man was not telling the truth. By that I don't mean they are irreconcilable in the sense that you may not feel that both parties were testifying in good faith. I am not going to try to decide whether prople were liars or not. But they can't be both telling the truth." (Ex. 7052-7053)

Although some defendants were convicted of both the conspiracy and of substantive counts, appellant was found not guilty on all counts.

(2) The trial testimony at the present trial.

In its opening, the Government stated it would prove that in the course of a criminal trial involving violations of the federal securities law, the appellant "met on two occasions with people involved in the Imperial Stock fraud scheme." (22a) One meeting was at Gatsby's restaurant and the other at the Americana Hotel. (22a) The Government claimed that such meetings and discussions were necessary to successfully carry out the stock manipulation scheme. (25a) In the fall of 1969, Murray Taylor, John Dioguardi, Philip Bonodono, Vincent Gagliaro and John Kelsey met at Gatsby's, and "in addition....there was another person present....Carmine Tramunti. The evidence will establish... there were discussions about the Imperial stock manipulation

scheme and Mr. Tramunti was present." (26a) Moreover, the Government also claimed the proof would show appellant met with two of the participants in the scheme at the Americana Hotel (26a); and that appellant falsely swore he did not know the persons named in counts 1-5 "all of whom he met during the course of the Imperial scheme." (27a)

On the basis of the opening defense counsel moved for a mistrial on the ground the Government was seeking to relitigate the facts conclusively determined against it at the prior trial. (29a-31a) Decision was reserved and the motion was ultimately denied.

*Michael Hellerman* testified he had committed many crimes, three of which resulted in convictions and others which the Government agreed not to prosecute.* Over objection and motion to strike, Hellerman was permitted to testify that the agreement not to prosecute was dependent upon his being honest and testifying only honestly and truthfully when called as a Government witness. (238a-239a)**

Hellerman stated he was involved in the Imperial manipulation (TR 63) and in business transactions with John Dioguardi relating to stocks (TR 66). Hellerman accompanied John Kelsey to the Americana Hotel in November of 1969, and saw Tramunti there.

*The list of Hellerman crimes is little short of astounding. See infra, page 11.

**During cross examination Hellerman reiterated that he got his deal with the Government only if he cooperated and told the truth (240a). The written agreement, containing the paragraph that Hellerman agreed to testify truthfully, was ultimately read in evidence over defense objection (241a-245a) and Hellerman testified that he lived up to all its terms (245a-248a). When defense counsel attempted to conduct recross examination on whether Hellerman had testified in a certain case, where the jury showed its disbelief of his testimony by acquitting, the trial court refused to permit the inquiry (284a-285a).

They sent a bottle of liquor to appellant and appellant came over, shook hands with Kelsey and Hellerman and was introduced to their wives. (TR 83-84) They then had a conversation about the Imperial Investment Corporation.

Hellerman testified that he had met appellant on prior occasions, having been introduced to him by John Dioguardi. (TR 87-88) He met appellant in the Pussycat Bar (TR 88), at Dioguardi's office (TR 89) at various restaurants and nightclubs (TR 92) and was at the same table with appellant and Dioguardi at the Colombo wedding (TR 90). Two witnesses were called to corroborate Hellerman's testimony that he and appellant were together at the Pussycat Bar and at the Colombo wedding but failed to do so.

*Bruce Bozzi* testified that he had owned the Pussycat Bar. He knew appellant, Dioguardi and Hellerman, but he had no recollection of any incident where he saw appellant and Hellerman together (TR 276) and he could not say that he saw them together at the Bar (TR 277).

*Joseph Barrone* testified that he entertained at the Colombo wedding and also worked for Hellerman for a few months. He knew both Hellerman and appellant. (TR 516-20) Although he saw Hellerman at the Colombo wedding and also saw Dioguardi and appellant there, he did not see Hellerman and appellant together, either at the wedding or during the time he worked for Hellerman. (TR 520)

Hellerman further testified he met appellant in the hallway of the Federal Court House during the Imperial trial.

Appellant told him to come over, not to look up and to "do the right thing" if Hellerman took the stand. (TR 94-95)*

On cross examination, Hellerman admitted extensive wrongdoing, including counseling Kelsey to file false documents with the SEC (TR 100), using Kelsey to perpetrate numbers of stock swindles (TR 100), and complicity in at least 20 criminal offenses between 1969 and 1970. (TR 112-138) Hellerman admitted he was a 'con man,' that he made numerous representations to people which were false (TR 107) and that when he made his first deal with the Government and promised not to commit more crimes, within a few months he proceeded to commit "many" more stock frauds (TR 104-6). All of these crimes involved fraud (TR 106) and the making of false statements to the public in an effort to hoodwink them for his own advantage (TR 125-126).

*John Kelsey* testified that he had been convicted in connection with the Imperial scheme and had been involved in four other stock frauds (TR 282). He had not been prosecuted in the other cases because he had an understanding with the Government which was that if he told the truth when they called him as a witness, he would not be prosecuted but that his agreement was null and void if he perjured himself. (250a-251a) Defense motion for a mistrial on the basis of this testimony was denied. (251a) The grounds for counsel's objections were elaborated at side bar. (252a-253a)

*Appellant's attorney at the Imperial trial, *Daniel Greenberg*, testified as a defense witness that he was with appellant on the day in question in the corridor outside the court room and that appellant and Hellerman were never near one another and never conversed together. (TR 534-535)

Kelsey stated he was involved in the Imperial stock manipulation with Hellerman and that early in November after he received a call from Hellerman he went to Gatsby's restaurant as "Mike's man". (TR 288) He claimed he was introduced to appellant at that meeting. (TR 288) According to Kelsey, Taylor, and Bonodono were also there. (TR 288-9)* The meeting lasted an hour and the subject of the conversation was the Imperial stock manipulation. (TR 290) He saw appellant again after the meeting at the Americana when Hellerman sent him a bottle of liquor and appellant came over to their table.

On cross examination, Kelsey admitted many violations of law while he was engaged in the securities business. (TR 306-7) He knew his office was acting to facilitate Hellerman's transactions in phony stocks. (TR 316) He stated he permitted himself to become the tool of Hellerman, who conned him into doing things that were wrong. (TR 311-12) Kelsey also admitted that he submitted false statements to the SEC in connection with the formation of J. M. Kelsey & Co. (TR 325) Kelsey stated that he lied before the Grand Jury and SEC after this because Hellerman told him to do so in order to protect Hellerman and so he would not get killed. (TR 332) He admitted telling the Grand Jury he met appellant in the Americana Hotel but claimed this was not one of his lies. (TR 342) On redirect, the Government brought out that Kelsey lied *before* he agreed to cooperate with the Government, but since that time, he

*Kelsey did not place Gugliaro at the meeting in this trial or at the former trial.

testified as a Government witness in three trials. (254a-255a) The Government then asked Kelsey if he had lied at those trials but defense objection was sustained. (255a) At side bar when defense counsel attempted to put on record his objection to this attempt to certify that Kelsey's prior trial testimony was true, the court stated that the point was without merit. (258a)

*Constance Kelsey*, the wife of John Kelsey, was called to testify concerning the Americana incident. In 1971, at the Imperial trial, she was asked to identify appellant as the man to whom Hellerman sent the liquor and who came to this table. She got down from the witness stand and looked closely at each person sitting at a table (TR 199), she was not hurried (TR 200), and when she resumed the witness stand and was asked if she saw the man, she answered "No." (TR 212-13) At the present trial, she testified that she was nervous because the courtroom was so large and was not able to make an identification because appellant had aged or perhaps he had glasses on* -- he just didn't look like the man she met at the Americana. (TR 198)

On cross and during a voir dire on her identification, Mrs. Kelsey admitted that she knew appellant was the only defendant on trial in this case and he would be sitting in the courtroom. (TR 202) She was shown pictures, including one of appellant, prior to trial. (TR 234-35) Before that she had seen appellant's picture in the newspaper, and had read the article. (TR 241) It

*Robert Mitchell, Esq., called by the defense, testified he recalled the incident at the Imperial trial, and that when Mrs. Kelsey went over to the table and looked at appellant he was not wearing glasses. (TR 553-54; 556-557)

was easier for her to identify appellant at this trial because there were only two people seated at the defense table. (TR 243) When asked:

> "Q. Are you confident, Mrs. Kelsey, that your ability to recognize him was not influenced by having seen his picture in the paper or having him appear as the only defendant in this courtroom?
>
> A. It is very possible that that could have been part of it, yes. I must say it probably had some bearing on it but not totally." (TR 243-44)

She further stated that it was very difficult to answer whether she was picking appellant out because she saw him at the Americana or because she had seen him in the courtroom in 1971, had seen his picture in the paper and had seen the picture in the U.S. Attorney's office:

> "A...it is a very difficult--how do you sort out the two, actually. It is a difficult thing to determine, which was more important, my meeting with him or the pictures. I can't say." (TR 246)

Mrs. Kelsey, first categorically denied knowing that her husband had identified appellant then stated possibly he had discussed it with her but she didn't recall it. (TR 238) Kelsey testified that he told her, within the past few weeks what his recollection of the Americana incident was. (TR 352-53)

*Marianne Hellerman*, the wife of Michael Hellerman, testified that she met appellant in McCarthy's Steak House when she was having dinner with John Dioguardi. (TR 429) She testified:

> "Q. Did there come a time later that evening when you saw your husband Michael?
>
> A. Yes, he came in after we had dinner.

Q. Then did you see Mr. Tramunti later during that evening?

A. Yes." (TR 429)

In November, she went to the Americana with her husband and the Kelseys. (TR 431) Kelsey then sent a bottle of whiskey to appellant's table. (TR 432) Appellant came to thank him for the whiskey. (TR 432-A)

On cross, she testified that before she went to the grand jury, she knew her husband had told a Government agent his recollection of the events at the Americana. (TR 438)

*Nelson Conover*, an FBI agent testified that in May of 1965, he took pictures of people entering and leaving the Fusco wedding at the Claridge Caterers in Brooklyn. (TR 400-401) One of the pictures, depicting a number of the individuals including appellant and Gugliaro, was introduced into evidence. (TR 402) The trial court later described the picture in this fashion:

> "The Court: I saw the picture. There are a number of people walking in one direction with Mr. Tramunti first. I believe some one else was second and Mr. Gugliaro was third. They were not looking at one another, just all going in the same direction..." (TR 494)

Over 200 people came out of the door at the conclusion of the wedding in groups of 4, 5, and 6. (TR 405-406) Appellant and Gugliaro came out in one of the groups. The agent did not observe Tramunti and Gugliaro speak to one another or go away together. (TR 406)

*Gilbert Dragani* testified that he pled guilty in the At-Your-Service Leasing stock fraud conspiracy and was awaiting sentence. (TR 408) He knew Michael Hellerman in connection

with that fraud. (TR 409) In July of 1970, he was at Hellerman's office for a closing and noticed the people sitting in another room. (TR 410) There were two or three people and Hellerman occasionally went into the other room to speak to them. (TR 411) One of these people was appellant. (TR 411)

On cross, Dragani vigorously denied that he was testifying in this case to curry favor with the U. S. Attorney, although he did hope the Government would make a favorable sentence recommendation. (TR 415-422) Dragani insisted that he became a Government witness in this case by accident when he was working with the Government on the At-Your-Service Leasing case.* (TR 421-423)

After the Government rested, the defense moved for a judgment of acquittal and renewed the collateral estoppel motion, and these motions were denied. (TR 528-29)

The defense called two witnesses. Robert Mitchell and Daniel Greenberg, whose testimony has been referred to above. *Carmine Tramunti* then testified as a witness in his own defense. He was asked no questions on direct as to his background, other than to state his age. (42a) The entire direct examination consisted of reading the statements he made at the prior trial and asking him whether they were true. (42a-62a)

On cross examination, the prosecution asked the appellant what he did for a living and how much he had invested

*The Rule 33 motion after verdict was brought *inter alia* on the ground that two other Government witnesses present at that same closing were also shown appellant's picture and either could not identify it or could not recall appellant being present; and that the assistant who conducted these interviews failed to inform anyone of this fact. The motion was denied on the day of sentence and the trial court's oral opinion, read into the record at that time, is set out in Appellant's Appendix at 212a, et seq.

in his business, over objection that the questions were remote to the issues on trial. (63a)* After a series of questions on how much money appellant made in 1973 (64a-72a), the prosecutor, over objection, asked appellant to "tell us a little bit about some of the other jobs you had before your present job." (72a) The appellant was then asked how long he had been with his firm, to which he answered close to 10 years, then was asked what he did before that, over objection on the ground of remoteness. (72a) When appellant answered the questions on his occupation during the past 10 years, he was asked about answers he gave under oath to a federal grand jury in 1966 concerning what he did for a living before 1966. (74a-83a) The prosecutor brought out, by reading the transcript, that in 1966 Tramunti testified he did not remember where he worked two years before. (73a-78a)

Appellant was asked, over objection, what other jobs he had since 1960 (80a) and answered "I don't remember sir, unless you refresh my memory". (81a) His 1966 grand jury testimony, stating he could not recall his other jobs, was read into the record. (81a; 83a-85a)

Appellant acknowledged he had been in the Pussycat Bar and other restaurants a number of times with John Dioguardi, an old friend of his. (85a-87a) Appellant stated he had heard Dioguardi had a business called Jard Products, but he did not know how many years Dioguardi had the business or whether he had

*The trial court permitted the questions on appellant's background. (63a)

it all through the 60's. (88a) Without fixing a time, the prosecutor asked whether he learned what Dioguardi did for a living by being with Dioguardi socially and appellant replied, again without fixing a time, that the only thing he knew about was Jard Products. (89a-90a) The prosecutor then read the 1966 Grand Jury testimony where appellant stated that he did not know what Dioguardi did for a living. (91a-92a)

In summation the prosecutor argued that the 1966 grand jury testimony proved that appellant began a "course of lying" in 1966, which he continued in 1971 when he took the witness stand at the Imperial trial, and in 1973, when he appeared as a witness in his own behalf. (136a-137a; 145a-146a)

After the verdict, a Rule 33 motion was filed on the ground that unbeknownst to either of the assistants in charge of the case or to defense counsel, the 1966 Grand Jury testimony had been compelled under a grant of immunity, and hence its use on this trial violated the appellant's rights under the Fifth Amendment and under the immunity statute pursuant to which the testimony had been compelled. The trial court's opinion denying this motion is reproduced in appellant's Appendix at 212a, *et seq.*

## POINT I

### THE VERDICT MUST BE SET ASIDE ON THE GROUND THAT COMPELLED TESTIMONY PREVIOUSLY GIVEN BY APPELLANT UNDER A GRANT OF IMMUNITY WAS USED BY THE PROSECUTION AT THE TRIAL BELOW.

In 1966, the appellant was subpoenaed before a federal grand jury. He was not a voluntary witness and he refused to answer any question, pleading the Fifth Amendment. Pursuant to 18 U.S.C. §1406, a court order was obtained compelling appellant to testify. The statute under which the testimony was compelled provided:

> "...But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."* (18 USC §1406)

Neither the prosecutors nor defense counsel had any knowledge that the 1966 testimony, used at this trial as evidence of prior similar acts and to impeach, was compelled under a grant of immunity.**

It is our position on this appeal that (1) compelled testimony was used against the appellant in a manner prohibited

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*Although this section was repealed, Section 260 of Public Law 91-452 (18 U.S.C. §§6001 et seq) contains a savings clause. Moreover, the Supreme Court has held that repeal of an immunity provision does not revoke immunity obtained under that statute. *Cameron v. United States*, 231 U.S. 710, 720 (1914).

**Defense counsel came into the case a few days before trial only because he was familiar with the Imperial case; he had never represented Tramunti before on any matter. (184a-185a) The Government attorneys did not discover that the testimony was compelled under a grant of immunity until after trial. (187a-190a)

by law; (2) that there was no waiver of the issue under *United States v. Indiviglio*, 352 F.2d 276 (2nd Cir., 1965), cert. den. 383 U.S. 907 (1966) since defense counsel did not know the testimony was immunized. Moreover, under the case law, the burden was on the Government, as custodian of the document, to maintain it in such a manner that its immunized nature was readily apparent to all Government agents; (3) that the appellant obtained immunity when he was compelled to forego his Fifth Amendment privilege and to testify, whether or not the testimony so compelled was useful and true, or useless, false, evasive; and finally, that on the facts, truthful compelled testimony was used against appellant at the trial below.

(1) <u>The compelled testimony was used against appellant in a prohibited manner</u>.

Under the terms of Section 1406, the appellant received immunity from the use of compelled testimony as evidence in any criminal proceeding in any court, save in two specified prosecutions which do not pertain in this case. In *Kastigar v. United States*, 406 U.S. 441 (1972), the Court held that a total prohibition on use of immunized testimony is required by the Fifth Amendment.

While there are only a handful of cases which involve 'use immunity', rather than 'transactional immunity', those decisions are clear that no use whatsoever can be made of the compelled testimony.

In *Cameron v. United States*, 231 U.S. 710 (1914), the Supreme Court held that the testimony of a bankrupt, given under a grant of immunity before an examiner, could not be used in the trial

of an indictment for perjury committed when the bankrupt subsequently gave testimony before the referee. See *infra*, pp. 31-33.

In *Application of Longo*, 280 F. Supp. 185 (DCNY, 1967), the court held that use immunity prohibited use of compelled testimony for impeachment purposes, over a claim by the petitioner that the compelled testimony would be admissible under *Walder v. United States*, 347 U.S. 62 (1954). In accord *United States v. Hockenberry*, 474 F2d 247 (3d Cir., 1972), distinguishing *Harris v. New York*, 401 U.S. 222 (1971) and reversing a perjury conviction because immunized testimony was used to impeach the defendant's credibility.* cf: *Alter v. United States*, 482 F.2d 1016, 1028 (9th Cir. 1973), where the Ninth Circuit sustained the constitutionality of 18 U.S.C. §6002, by adopting the Government's argument that compelled testimony cannot be used in any criminal prosecutions except those specifically exempted by the statute's own terms.

It is clear from the prosecution's summation that the testimony compelled from appellant in 1966 was used at this trial, not only to impeach, but as affirmative evidence of prior similar acts to establish a course of illegal conduct. Notwithstanding this use of the immunized testimony, the trial court denied relief

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*It is clear from the facts in this case that neither *Walder*, *supra*, nor *Harris v. New York*, *supra*, would apply in any event.

On direct examination, the appellant was not asked any questions about his background nor did he volunteer any such information. As in *Agnello v. United States*, 269 U.S. 20,35 (1925) and in contrast to *Walder*, appellant did nothing on direct examination to open the door to questions as to his backgroung on cross. Moreover, there was no claim that appellant's answers to the questions put to him by the prosecutor on cross examination were false. Hence the rationale of *Harris v. New York* -- that one opens the door to impeachment with otherwise inadmissible evidence by answering falsely in the course of one's cross examination -- also does not apply.

on two grounds which cannot be sustained on this appeal: that defense counsel, who had no knowledge of the grant of immunity, nevertheless waived the error by failing to object on this unknown ground*; and that the defendant did not receive immunity in 1966, although he was compelled to testify, because his compelled testimony was false and evasive.

(2) The *Indiviglio* rule is not applicable.

The District Court held that since defense counsel failed to make specific objection to introduction of immunized testimony, that it could decline to notice the error under *United States v. Indiviglio, supra,* (216a-218a). There is, however, one critical distinction between this case and *Indiviglio* which the District Court failed to take into account. In *Indiviglio* "the defense attorneys knew the facts of the defendant's arrest and statement" and despite their knowledge of the facts, failed to make specific objection. (1352 F2d at 279) In this case "at the time of the cross examination, neither the assistant United States attorneys conducting the prosecution, nor defendant's trial counsel were aware that the defendant had testified in 1966 under a grant of immunity."** (215a-216a)

The *Indiviglio* rule has never been applied where defense

*Although vigorous defense objection was made to the use of the grand jury minutes on other grounds (see 72a, 74a-75a, 80a, 81a-83a, 84a, 86a, 90a) and no claim has ever been made that the defense sat on its hands and permitted the material to come in for its own strategic purposes.

**The trial court, very properly, did not seek to attribute any presumed knowledge by the defendant to defense counsel. See *United States ex rel Raymond v. Illinois*, 455 F2d 62 (7th Cir. 1972) cert. den. 409 U.S. 885, where the Court held that a prosecutor's Brady obligation was not satisfied by disclosure to the defendant, since one could not assume that a defendant would be astute enough to realize the legal significance of the information and convey it to his attorney.

counsel was not aware of the salient facts upon which to base his objections at the time the evidence was introduced. While there are no cases precisely in point in this Circuit,* cases from three other circuits in highly analogous situations hold that "obviously, defense counsel could not be expected to object [to the submission of the evidence] unless he had knowledge thereof." *United States v. Douglas*, 155 F2d 894, 896 (7th Cir, 1946); *Osborn v. United States*, 351 F2d 111, 116 (8th Cir, 1965); *Dallagro v. United States*, 427 F2d 546, 554 (D.C. Cir, 1969).

When the grand jury minutes were used on cross-examination in this case, defense counsel had no knowledge of their immunized nature. He could not be expected to possess the clairvoyance necessary to see that a constitutional impediment to their use existed, especially since this notion never even crossed the mind of the prosecutors, who made a deliberate pre-trial judgment to use the grand jury material and who never thought to see if it had been given under a grant of immunity. As defense counsel later stated, he had no reason to assume that the trial assistant, who enjoys an exceptional reputation for fairness and integrity, would use grand jury testimony in violation of a grant of immunity.

In a similar situation, the Fourth Circuit refused to find a waiver, holding:

> "It is no answer that [appellant's] attorney failed to ask for the results of the test [made on a gun

*In the analogous situation where the case giving rise to the objection was not decided until after trial, this Court has held that defense failure to object when the evidence was introduced is not a waiver under *Indiviglio*. *United States ex rel Daskal v. Nena*, 361 F2d 178, 180 n. 1 (2 Cir, 1966) cert. den. 385 U.S. 874.

> introduced into evidence]. While a diligent defense counsel might have learned about the police reports, this is too speculative a consideration to outweigh any unfairness that actually resulted at the trial. He may have been misled into thinking that the tests, if made, supported the state's theory and were adverse to his client, and that otherwise the state's attorney would not have produced the gun in court."
> *Barbee v. Warden*, 331 F2d 842, 844 (4th Cir, 1964).

We submit that not only did the District Court err in finding a waiver under *Indiviglio*, but that under other case law, the obligation to determine whether the 1966 testimony was immunized rested with the prosecution, and the use of such testimony, with or without actual knowledge by the prosecutor violated the appellant's rights.

In *United States v. McDaniel*, 482 F2d 305 (8th Cir, 1973), an assistant United States attorney obtained and read the defendant's state grand jury testimony. He was apparently "unaware that [the] testimony was protected by a statutory grant of immunity." (482 F2d at 307) The court nevertheless held that since the immunized testimony had been used to secure the indictment and conviction, that relief must be granted under *Kastigar v. United States, supra*. The court reasoned that under *Kastigar* it is the total prohibition on use of the immunized testimony which supplies the Fifth Amendment safeguard and that:

> "A person accorded this immunity...and subsequently prosecuted is not dependent for the preservation of his rights upon the integrity and good faith of the prosecution."
> *Kastigar v. U.S., supra*, 406 U.S. at 460

That the *McDaniel* result should also apply in this case is confirmed by an analysis of cases involving a prosecutor's

unknowing suppression of *Brady*-type material. (*Brady v. Maryland*, 373 U.S. 83 [1962])

Perhaps the most instructive of these cases is *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir., 1961), where 42 documents which would have been of obvious benefit to the defense in cross-examination, were misplaced during trial. The Government had custody of the documents prior to trial and "[s]omeone in the Government's employ so arranged them in the files that the prosecutor did not find them when he attempted to comply with the trial court's order to permit defense counsel to inspect all documents relating to [the witness'] testimony.' 291 F.2d at 570. Rejecting the Government's claim that no negligence was proved, this Court held:

> "...we hold that it was the duty of the Government to keep the evidence of which it was custodian in such a manner that it would be available for use upon the trial by all parties. This duty was breached by someone in the Government's employ... For practical purposes the...papers were temporarily lost. We hold this was negligence chargeable to the prosecution." [291 F.2d at 570]

In this case, the Government, under Rule 6(e),* Federal Rules of Criminal Procedure, is the custodian of the grand jury minutes. As custodian, it is the Government's duty to keep the evidence in such a manner that any Government attorney having access to the minutes under Rule 6(e) will be made aware of their immunized nature, because:

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*Which empowers disclosure of matters occurring before the grand jury only to "the attorneys for the government for use in the performance of their duties," except upon court order.

> "The prosecutor's office is an entity and as such it is the spokesman for the Government... Procedures and regulations can be established...to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio v. United States*, 405 U.S. 150, 154 (1972)

In another negligent suppression case analogous to this one, *Ingram v. Peyton*, 367 F.2d 933 (4th Cir., 1966), the prosecutor inadvertantly mis-spelled the name of the complaining witness in the indictment, and defense counsel did not learn that this witness had been convicted of perjury until after trial. The court granted relief because critical information was unavailable to the defense at trial, it being immaterial whether this occurred by prosecutorial error rather than by concealment. In accord, *Nash v. Purdy*, 283 F.Supp. 837, 841 (S.D. Fla., 1968): "The fact that evidence allegedly suppressed from the defense was also withheld from the prosecuting authorities has no bearing on the issue. It is clear that non-disclosure is not neutralized when the deception is practiced on the prosecuting attorney as well as the defense."*

We submit that immunized testimony was improperly used to secure the verdict. This violation of right is not nullified because the trial assistants were unaware of the nature of the testimony they used. Under the cases, it is the use of the testimony, not the bad faith of the prosecution, which violates the immunity. *United States v. McDaniel, supra, Kastigar v. United*

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*Cf. *Application of Kapatos*, 208 F.Supp. 883, 888 (SDNY, 1962), where Judge Palmieri granted a writ on other grounds, but observed--as to information given to one assistant district attorney, who left the office and which was subsequently lost--that "...I do not think an accused's rights as defined by *Napue* [*Napue v. Illinois*, 360 U.S. 264 (1959)] should depend on the fortuitous circumstances that the district attorney who conducts the investigation also conducts the prosecution..."

*States, supra.* Moreover, the Government, as the custodian and proponent of the evidence, has the obligation to maintain it so that its immunized nature will be readily apparent to any Government attorney having access to it under Rule 6(e). *Giglio v. United States, supra; United States v. Douglas, supra; Consolidated Laundries Corp. v. United States, supra.* There was no waiver under *Indiviglio* since defense counsel had no knowledge or reason to believe that the testimony was immunized.* Defense counsel cannot be faulted for failing to intuit that the material was objectionable on this ground, since the prosecutor, who was the "moving factor in the matter" failed to consider that it might have been compelled under a grant of immunity when he decided to use it. *United States v. Douglas, supra; Barbee v. Warden, supra.*

(3) Any testimony, true or false, compelled under a grant of immunity cannot be used in any subsequent criminal proceeding except the two specified by statute.

The Fifth Amendment provides that no one "shall be compelled in any criminal case to be a witness against himself." The prohibition against the use of compelled testimony flows from the amendment itself and is not merely a statutory right:

> "A witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." *Adams v. Maryland,* 347 U.S. 179, 181 (1954)

*Any knowledge which the defendant may or may not have had concerning the immunized nature of seven-year-old testimony is not legally significant, as the defendant cannot be expected to function as his own attorney and to apprehend the legal significance of such a fact. *United States ex rel. Raymond V. Illinois, supra.*

In *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), the Court held the privilege means that both state and federal governments:

> "are constitutionally compelled to establish guilt by evidence independently and freely secured and may not by coercion prove a charge against an accused out of his own mouth."

When evidence has been compelled, then the Fifth Amendment itself bars the use of that evidence in any criminal prosecution. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).* Testimony may be compelled despite a claim of privilege only "if there is immunity from federal and state use of the compelled testimony..." *Gardner v. Broderick*, 392 U.S. 273, 276 (1968).

When Tramunti testified in 1966, he did not do so voluntarily and freely. He was compelled, despite his claim of privilege, to give evidence which a prosecutor might thereafter want to use against him, because he was granted immunity. If he continued in his refusal to testify, despite the grant of immunity, he would be jailed for contempt.

In *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 347 (1963), the Supreme court held:

> "It is of course a constitutional principal of long standing that the prosecution 'must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.' *Rogers v. Richmond*, 365 U.S. 534, 541. We have no hesitation in saying that this principle also reaches evidence of guilt induced from a person under a governmental promise of

*In *Murphy*, the Court stated:

> "The constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements...and the Government may not permit the use of self-incriminating statements elicited by compulsion." (378 U.S. at 57 n.6)

> immunity, and where that is the case such evidence must be excluded under the Self-Incrimination Clause of the Fifth Amendment."

In *Shotwell*, the court found that the evidence at issue was not compelled by a grant of immunity and denied relief. However in doing so, it was careful to state:

> "A quite different case would be presented if an offer of immunity had been specifically directed to petitioners in the context of an investigation, accusation, or prosecution. A disclosure made in such circumstances would not have fallen under the voluntary disclosure policy, which by definition was applicable only to disclosures made before any investigation had commenced, and would have been inadmissible in evidence under the *Bram* test. Under the rule of *Rogers v. Richmond, supra*, the truth or falsity of such a disclosure would then be irrelevant to the question of its admissibility. We agree that the rule of that case, involving a state trial, is equally applicable in a federal prosecution." (371 U.S. at 350 n.10)

We submit that the trial court's holding that appellant's 1966 grand jury testimony was not entitled to any Fifth Amendment protection because it was false and evasive is directly contrary to the holding in the *Shotwell* case and cannot be sustained in this court.

Additionally, the cases which the trial court relied on to reach its conclusion that testimony compelled under a grant of immunity can be used in any criminal proceeding--notwithstanding the fact it was compelled but provided a district court judge finds that it was false--were both decided prior to the *Shotwell* case, and do not support a contrary result in any event.

*Glickstein v. United States*, 222 U.S. 139 (1911) held only that a grant of immunity does not exempt a witness from

prosecution for *that* perjury, nor does it prohibit the use of the alleged false testimony in a prosecution for such perjury*. It did not hold that a witness fails to obtain immunity from the use of the allegedly false testimony in other criminal trials. The best proof that the district court misconstrued the *Glickstein* holding is an analysis of the *Cameron* case, *supra*, 231 U.S. 710, where a similar argument was made by the Government in the Supreme Court and was rejected.

In *Cameron*, a bankrupt sought to conceal the address of one Smith, who had been used as the ostensible purchaser of certain goods in attempt to put them beyond the reach of creditors. In furtherance of his fraudulent attempt to conceal Smith's whereabouts, Cameron twice testified he did not know Smith's address. In August, before the examiner, he stated he did not know exactly where Smith lived, but thought it was someplace on St. Nicholas Avenue. A few months later, before the referee, he testified he did not know Smith's address at all. As was shown in the Circuit Court opinion, both statements were patently false as he had written Smith's exact address in a letter on the same day he professed, before the examiner, not to know exactly where Smith lived. *U.S. v. Cameron*, 192 Fed. 548, 550 (2 Cir. 1911).

Only the second indictment charged Cameron with perjury in denying that he knew Smith's address in his testimony before the referee, although, quite obviously, he could have been charged

*Section 1406 contains the *Glickstein* exception.

with perjury as to that fact in his testimony before the examiner. His earlier testimony, before the examiner, was offered on the second indictment as background to show that *Cameron* "fully understood the nature of his testimony and that it related to William C. Smith of St. Nicholas Ave...." 192 Fed. at 550.

To justify the use of the testimony given in front of the examiner in connection with the indictment for perjury for testimony *later* given in front of the referee (and quite obviously, not in his prosecution for perjury committed while making the statement) the Government argued--as it does here--that "this question is covered by the reasoning of *Glickstein v. United States*, 222 U.S. 130..." (*Cameron v. United States*, Record on Appeal to the Supreme Court, Government Brief p. 2.) The Government argued that although the actual holding in *Glickstein* was 'only that the testimony assigned as the corpus of the perjury may be used and it did not raise the precise point asserted here," that nevertheless, the "clear purport of the *Glickstein* case" was that:

> "The immunity was intended to be given in relation to 'past offenses' (those to which the privilege against self-incrimination relates) and not to misconduct on the stand itself. In other words, it was not intended to modify the duty of a witness or the usual course of prosecution for breach of that duty. To so construe it would be to assume that while granting indulgence for the sake of getting testimony, Congress intended to withdraw the usual safeguards which make testimony truthful and of value; in other words, as the court said, to grant 'a license to perjury.'" (*Cameron*, Record, Government Br. p. 12)

The Supreme Court rejected the argument, holding:

> "The testimony offered as to what *Cameron* swore to before the examiner, while not tending to establish the charge of perjury based upon testimony

> in that instance, did contradict the testimony which he had given before the referee and directly tended to establish the charge under that indictment. We think to permit the use of testimony for that purpose was to permit the testimony given in the one instance to be used in a criminal proceeding based upon testimony given in the other instance, and therefore to violate the immunity given in §860..." (*Cameron v. United States*, 231 U.S. at 724.)

This recital of facts and arguments in *Cameron* shows that *Glickstein* did not hold that a witness who testifies falsely under a grant of immunity fails to obtain immunity. The 'license to commit perjury' language in *Glickstein* means only that a witness does not obtain immunity from a *prosecution* for that act of perjury and cannot object, on the ground of immunity, to introduction of his testimony *in that prosecution*.

In a subsequent case, *Sherwin v. U.S.*, 268 U.S. 369, 372 (1925), the Court characterized *Glickstein* and *Cameron* as deciding "whether an *admitted immunity* extends to the particular use of the testimony." (emphasis added) Quite clearly, the point of decision in each case was the propriety of the particular use made of the testimony; and not whether immunity had or had not attached to the testimony. The *Shotwell case, supra*, conclusively demonstrates that *Glickstein* did not hold that the Fifth Amendment privilege is retroactively taken away from a witness who testifies falsely under compulsion.

The *Bryan* case (339 U.S. 323) relied upon by the district court is altogether inopposite. *Bryan* did not decide that compelled testimony given over a claim of Fifth Amendment privilege could be used in a prosecution for willful default (217a-218a).

The Supreme Court in its opinion clearly states that the witness never claimed her Fifth Amendment privilege as a basis for her refusal to produce the subpoenaed books and hence there was no question raised as to the scope of testimonial immunity under the Fifth Amendment. 339 U.S. at 337.

*Bryan* and *Glickstein* are not authority for the proposition that a district court judge, in a criminal prosecution for a crime other than perjury or contempt committed in the course of testifying, can permit the Government to use testimony compelled from one who was a non-voluntary witness before a grand jury simply because the district judge determines that the compelled testimony was false and evasive.

The Fifth Amendment does not focus on the truthfulness of the testimony, but on whether it was compelled. Once it is clear that the testimony was compelled, "...the truth or falsity of such a disclosure would then be irrelevant to the question of its admissibility." *Shotwell Mfg. Co. v. U.S., supra.* The amendment does not prohibit only the compulsion and use of truthful testimony - it prohibits the compulsion and use of all testimony.*

If the Fifth Amendment self-incrimination clause only applied to truthful compelled testimony, why should the other rights and privileges accorded by the Fifth Amendment apply if a defendant

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*See in this respect *People v. Allen*, 166 NW 2d 644 (Mich. Ct. of Appeals, 1969), which suppressed false testimony compelled under a statutory scheme like that condemned in *Garrity v. New Jersey*, 385 US 493 (1967). The court stated:

> "Of course, what is revealed as a result of a waiver is of no import in determining whether the waiver was voluntary or coerced. If the waiver was coerced, the result thereof cannot be received in evidence."

has committed perjury or otherwise comported himself dishonorably. Under the District Court's reasoning, the appellant could be retried on the Imperial stock fraud indictment, on the ground that the double jeopardy clause of the Fifth Amendment does not apply to a defendant who secured his acquittal by perjuring himself. Quite obviously this is not the law. The remedy which the Government has in such a case is not to strip a defendant of his double jeopardy protection and retry him for the crime because he gave false testimony, but to indict him for perjury and punish him in that fashion. The Government had precisely the same remedy in this case -- not to strip appellant of his Fifth Amendment protection and use the immunized testimony willy-nilly, but to have indicted him for perjury under the plain terms of Section 1406.

Not only is the District Court's holding that the Fifth Amendment gives no protection to false compelled testimony erroneous, its further holding that Section 1406 permits the use of such testimony in prosecutions other than the two specifically enumerated therein, is also erroneous.

Even assuming that a statute could withdraw all Fifth Amendment protection from a compelled false statement, Section 1406, on its face, does not do so. It contains no language to indicate that only truthful or non-contemptuous testimony receives immunity after it is compelled. In construing a statute, the court ought "to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great Northern Railway Co.*, 343 US 562 (1962). Moreover, one would

assume that if false testimony is not immunized by the statute, then it could be used in other cases whenever there was a perjury conviction under §1406. But while there are many such perjury prosecutions, no case holds that a jury finding that the testimony was false thereby stripped the witness of his immunity and permitted the Government to use the perjured testimony in another criminal case, or, where transactional immunity was afforded, to prosecute the witness for crimes which had been the subject matter of the false testimony.

The District Court further states that the statute must be read as only immunizing true testimony because the purpose of conferring immunity is to obtain truthful testimony and this purpose is not served when the witness proffers perjured or contemptuous testimony.

The answer to this is that the District Court has misconstrued the nature of the grant of immunity. It is necessary to grant immunity from use of one's testimony in order to overcome a valid plea of the Fifth Amendment and thereby to obtain testimony which the Government otherwise is not entitled to have because a witness has interposed his Fifth Amendment privilege against self-incrimination. "Grants of immunity are not a matter of right or wrong. Rather they are the products of a calculation by the immunity granting agency that its need for information overrides the public interest in prosecuting those witnesses whose conduct made them possible defendants in a possible proceeding." 2 *Working Papers of the National Commission on Reform of Federal Criminal*

*Laws*, at 1408. At times, the Government will be dissatisfied with the information it has compelled, either because it is not useful, not responsive or not truthful. However, such after-the-fact dissatisfaction has never been held a basis for rescinding the grant of immunity to deprive one retroactively of a valid claim of Fifth Amendment privilege.*

Moreover, this kind of *quid pro quo* approach to the immunity grant was rejected by the Supreme Court in *Adams v. Maryland, supra*. The Government had urged the court to hold that a witness before a congressional committee should be entitled to no immunity whatsoever since the statute pursuant to which he testified had long been declared unconstitutional and hence it could not be used to compel incriminating testimony. The Court answered the argument in this fashion:

> "Section 3486 does not provide 'complete' immunity. The original purpose of Congress to compel incriminating testimony has thus been frustrated. It is argued that Congress could not have intended to afford any immunity to criminals unless it was thereby enabled to compel them to testify about their crimes. Therefore, it is said, §3486 should now be given the narrowest possible construction--made effective only when the Fifth Amendment privilege is claimed, and held applicable only to United States courts. Because Congress did not get all it hoped, we are urged to deny witnesses the protection the statute promises. But a court decision subsequent to an act's passage does not usually alter its original meaning. And we reject the implication that a general act of Congress is like a private contract which courts should nullify upon a showing of partial or total failure of consideration."

*Cf. *People v. Allen, supra*, page 33, ft. nt.

Moreover, it is clear from the face of Section 1406 that the grant of immunity therein provided was not, in fact, conditional upon receiving only truthful testimony in exchange. Within its own terms, the statute takes into account the fact that some compelled testimony will be false or contemptuous, and the statute makes specific provision for dealing with false or contemptuous compelled testimony if and when it occurs. The statute on its face provides that if compelled testimony is false then the witness can be tried for that perjury, with all the due process safeguards attendent in a criminal trial. If the issue of perjury can be decided by a district court judge without benefit of a criminal trial, then the statutory scheme for dealing with false compelled testimony is circumvented and the witness denied due process. cf. *Ex parte Hudgins*, 249 U.S. 378 (1919) and *In re Michael*, 326 U.S. 224 (1946).

Even if we assume that a grant of immunity is nothing more than a bargain between the Government and a witness -- an agreement not to use the compelled testimony in exchange for the truth -- the contempt and perjury sanction make practical sense as an enforcement mechanism, whereas the blanket exemption of false testimony from a grant of immunity does not.* If the Government believes that a witness has breached his bargain, the law gives the Government a remedy which the private party to a breached contract does not have.

*Consider also the anomolies which could result if the District Court's reading of the statute is sustained: A witness testifies under compulsion and the Government believes the testimony is false. The witness is indicted for perjury and for the crime about which he falsely testified. At the trial on the latter indictment, the false testimony is admitted and the witness convicted. At the perjury trial, he is acquitted. Must the first conviction be vacated on the ground that truthful testimony compelled under a grant of immunity was used to secure his conviction?

If it can prove a case of perjury or contempt in a court of law then it can have the witness punished for his breach of contract with a prison sentence. The appellant could have been tried for perjury or contempt in 1966. But it makes no sense to say that even though the Government had these sanctions available yet did not bring these prosecutions, it should also have the right to rescind the contract and strip the witness of the immunity at any time in the future when the allegedly false testimony may help it secure a conviction.

(4) The Government used immunized testimony which was not false.

The Government developed three lines of inquiry from the 1966 grand jury testimony: first, concerning appellant's employment in Eiffel Classics (73a-78a); second, concerning other employment since 1960 (80a-85a); and finally whether appellant knew in 1966 what Dioguardi did for a living (85a-92a; 124a; 130a).

We submit that at best the prosecutor established a conflict between the testimony at this trial and the 1966 testimony only in the first of these three respects. No conflict was shown to exist as to the second and third lines of questions and hence there was no basis in the record for the District Court's finding that this testimony was false and not entitled to immunity.

At this trial, appellant was asked to tell the jury what other jobs (besides Eiffel Classics) he had since 1960 - a thirteen year time period. Appellant answered "I don't remember, sir, unless you refresh my memory." (80a-81a) The prosecutor then used the immunized testimony to show that in 1966, when appellant was

asked, without any specification of a time period, "anything else that you can remember you did for a living?," appellant answered he did a lot of things and he couldn't remember. (81a)

At this trial appellant was asked:

"Q. And you knew that Mr. Dioguardi had an office called Jard Products? Isn't that right.

A. I heard of it.

Q. And that was his business

A. That's what I heard.

Q. And he had that business for a number of years, isn't that correct?

A. I don't know how many years he had it. I don't know.

Q. All through the '60's.

A. I can't answer you. I don't know." (88a)

Later appellant was asked:

"Q. And is it not a fact, Mr. Tramunti, that as a result of your knowing Mr. Dioguardi and being with him socially you learned what he did for a living? Isn't that correct?

A. Well, the only thing I know about was Jard Products." (90a)

The prosecutor never established at what point in time appellant learned about Dioguardi's connection to Jard Products, or whether he learned about it by being with him socially.*

Despite this, the prosecutor used the 1966 immunized testimony, where appellant stated he did not know what Dioguardi did for a living, as if it established a contradiction and demonstrated that appellant lied in 1966. He argued that the testimony

*On redirect, appellant restified that he did not know, in 1966, that Dioguardi was connected with Jard Products but learned this sometime afterwards. He did not know how long Jard Products had been in existence, or whether it was in existence in 1966 and he did not know how long Dioguardi had been associated with that company (124a).

proved that appellant continued the "course of lying which he began as early as 1966" when he was a witness in his own behalf in 1971 and in 1973. (137a)

The prosecutor never established a contradiction between appellant's 1966 answer that he could not recall all the things he had done for a living during an unspecified time period before 1966 and his present testimony that he would like his memory refreshed on other jobs he held between 1966 and 1973. Nor did the prosecutor establish that there was any contradiction of appellant's 1966 statement that he did not then know what Dioguardi did for a living, by his present testimony that, as of 1973, he had acquired knowledge of Dioguardi's association with Jard Products. If the prosecutor is attempting to establish perjury, it is incumbent upon him to frame his interrogation acutely to elicit the information he seeks. *Bronston v. United States*, 409 U.S. 352 (1973). When the answers the prosecutor elicits do not establish perjury was committed at the time the immunized testimony was given, then the prosecutor should not be able to excuse his use of this testimony and to strip a witness of Fifth Amendment rights on the ground that the testimony was obviously false.

In sum, the appellant's rights under the Fifth Amendment and under Section 1406 were violated at the trial below when the prosecutor used compelled testimony obtained from him under a grant of immunity to secure the conviction. There was no waiver of the issue, since defense counsel had no knowledge of the facts upon which to base an objection on this ground and since the

Government had the duty to ascertain whether the testimony was immunized before using it at trial. Moreover, it is the use of the testimony, not the good or bad faith of the prosecutor, which is at issue. The court below erred in holding that the testimony, though compelled, could nevertheless be used, as the Fifth Amendment protection extends to all compelled testimony, true or false. Moreover, Section 1406 contains the specific and exclusive provision for dealing with false testimony. It permits use of the false testimony in a prosecution for perjury committed while testifying under a grant of immunity. It does not permit use of such false testimony in any other prosecution. Even assuming that false immunized testimony can be used at any trial, the Government failed to establish that the immunized testimony was false. For these reasons, the judgment appealed from must be reversed and a new trial ordered.

## POINT II

### THE COURT BELOW ERRED IN REFUSING TO GRANT DISMISSAL AT THE CLOSE OF THE PROSECUTION'S CASE ON GROUNDS OF COLLATERAL ESTOPPEL.

At the Imperial trial, the jury necessarily found that the conspiracy alleged in the indictment* did exist, as it returned guilty verdicts against two defendants on the conspiracy count. Under the court's charge, the next issue to be decided was whether or not each defendant participated in the conspiracy.

The Government argued that appellant's participation in the conspiracy was established by his presence at the Gatsby meeting, where both factions agreed on how to split up the anticipated $1,400,000 profit from the fraud. (supra, p.6) The argument was eminently correct because this evidence, if believed, would have been sufficient to sustain a guilty verdict. *US v. Ragland*, 375 F2d 471, 479 (2 Cir. 1967); *US v. Pui Kam Lam*, 483 F2d 1203 (2 Cir., 1973); *US v. Marrapese*, 486 F2d 918 (2 Cir., 1973).

Taylor and Kelsey testified that appellant was present at the meeting. Appellant testified he was not present. The prosecutor characterized the issue as one of credibility, as did the trial court. The issue necessarily decided by the verdict was whether appellant was present at the Gatsby meeting. If he were, then he was guilty of conspiracy. When the jury acquitted him, they necessarily believed his testimony that he was not present and disbelieved

*The Court had charged that if the jury found that more than one conspiracy had been proved, then it should acquit all defendants on the conspiracy count. (Ex. 7009-10)

the Government testimony to the contrary.

The question of whether appellant lied not only about the Gatsby meeting, but also when he testified that he did not know Kelsey, Taylor, Gugliaro and Bonodono was not merely ancillary but was inseparably intertwined with the ultimate issue of guilt or innocence. The prosecutor in Imperial acknowledged this when he argued to the jury that the defendants denied knowing one another "for one reason -- because they are guilty of the charges in this case." (Ex. 6941-42) The prosecutor also argued that the Americana meeting was crucial to the issue of whether appellant knew Kelsey and Hellerman, because "how do you think Kelsey can identify Tramunti in this courtroom if he didn't see the man, if he didn't meet the man?"

Whether appellant lied when he denied being at the Gatsby meeting and denied knowing the alleged co-conspirators, or whether Kelsey and Taylor lied was the single issue litigated in the Imperial trial as to the appellant. That the self-same question was again litigated in the present case is best demonstrated by the Government's opening statement. The prosecutor stated that the Government would prove that appellant lied when he denied being at the Gatsby meeting where the Imperial manipulation was discussed, and that he lied when he denied knowing the persons named in counts 1-5 "all of whom he met during the course of the Imperial scheme." (26a-27a)

The double jeopardy clause of the Fifth Amendment is a bar not only to retrial for the same offense, but also to relitigation of adjudicated issues whether they emerge in trials for the

same or distinct offenses. *Ashe v. Swenson*, 397 US 436 (1970); *Harris v. Washington*, 404 US 55, 56 (1972); *US v. Williams*, 341 US 70 (1951); *Sealfon v. US*, 332 US 575 (1948). The collateral estoppel determination "depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict in the first trial" in order to distill out what "at each trial was crucial to the prosecutor's case and which was necessarily adjudicated in the former trial." *Sealfon v. US*, 332 US at 579; *US v. Kramer*, 289 F2d 909 (2 Cir., 1961). If it is identical, the Government is estopped by the prior determination from relitigating those self-same issues irrespective of whether the jury considered all the relevant evidence (*Harris v. Washington, supra*, 404 US at 56)* or whether the jury was in error at the first trial, *US v. Nash*, 447 F2d 1382, 1385 (4th Cir., 1971).

Where a previous judgment of acquittal was based on a general verdict, the court must examine the record of the prior proceedings to determine whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. *Sealfon v. US, supra; US v. Kramer, supra.*

In *US v. Nash, supra*, the Government tried a defendant for perjury after her acquittal for stealing a letter from the mails.

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*In *Harris*, the prosecution could produce evidence at the second trial not available at the first trial, and argued that the issue had not therefore been fully litigated. The Court held that this was immaterial on the collateral estoppel issue. Hence the fact that Hellerman and Dragani testified at this trial, but not Imperial, is not relevant in determining the issue here. Moreover, this evidence was not new or different, it was merely cumulative. See *US v. Nash, supra*, concurring opinion.

The letter contained three 25-cent pieces and two dollars. She testified she received the quarters found in her possession from a change machine. At the perjury trial, the Government contended the evidence demonstrated she could not possibly have received the quarters in this fashion. In holding the perjury prosecution barred on collateral estoppel grounds, the court stated:

> "Following the prescriptions in *Sealfon* and *Ashe* we conclude that the jury in the first case undoubtedly passed upon the believability of Estelle Nash's statements made under oath. The jury may have been in error, but certainly it appraised the defendant's credibility. It is inconceivable that there would have been an acquittal if the jury had not accorded truth to her testimony.
>
> Of course, the Government did not have to prove that she had *not obtained* the coins as she explained, but it did have the burden of establishing that she had taken the letter containing the coins from the mail. The change machine explanation was part of her defense and had to be weighed by the jury. Consequently, it cannot have been simply a collateral issue. While she was under no obligation to prove that the coins had *not come* from the mail box, still when her story was adduced, it created a conflict with the Government's proof. There were but two conflicting explanations of her possession to be considered. Thus, the jury 'necessarily' had to pass upon the truthfulness of her account. The issue was 'crucial' and once adjudicated, its redetermination in a trial for another offense is estopped." (447 F.2d at 1385)

This case is even a stronger one, because the Government did have to prove that appellant was present at the Gatsby meeting, for that was the only non-hearsay evidence to establish his participation in the conspiracy. There were two directly conflicting versions, between which the jury had to choose, hence the jury necessarily had to pass upon the truthfullness of appellant's testimony. In this respect, the case is much like *Ehrlich v. US*,

145 F.2d 693 (5 Cir., 1944), where the defendant was found not guilty of violating Emergency Price Control regulations. The defendant testified he had not received payments in excess of the ceiling prices. The proof at the perjury trial consisted of sales slips showing that he had done so on certain sales. The court reversed, holding that "where the fact testified to and to which the perjury is charged was the act constituting the basis of the crime charged -- and this fact was necessarily determinative of the issue -- an acquittal of the first offense bars a prosecution for perjury." In accord, *Wheatley v. US*, 286 F.2d 519 (10th Cir., 1961).

The case relied upon by the Government below in opposition to the pretrial collateral estoppel motion, *United States v. Williams, supra*, is not determinative of the issue after trial. In *Williams*, the Court held that while indictment for perjury was not barred by an acquittal at a prior trial, the doctrine was available if, after trial and under the *Sealfon* test, acquittal on the substantive charge necessarily determined the matters in issue even though the offenses were different.

*US v. Drevetzki*, 338 F.Supp. 403 (ND Ill, 1972), contains a comprehensive review of the authorities as they relate to the issue posed by a trial for perjury after an acquittal. There the defendant was charged with stealing merchandise from interstate commerce. He testified, and denied making a statement to an agent admitting complicity in the offense. "Admittedly the issue directly decided in the earlier case was not whether defendant told the truth

about his statement to the agent but rather whether he stole the boxes of clothes." 338 F.Supp. at 407. The Government argued it was not contending the defendant lied about his involvement in the theft but "about the peripheral matter of his statement of admission to the agent." The court held that the finding of guilt was "so intertwined with the issue of the defendant's veracity regarding his statement to the agent" as to render the prosecution barred by the Fifth Amendment.

In this case it is even more impossible to separate the issue of whether appellant lied about his involvement in the Imperial fraud from whether he lied about attending the Gatsby meeting and knowing the other conspirators. The fact that the jury found that the single conspiracy charged in the indictment did exist and found him not guilty -- in spite of testimony that he was present when the division of $1,400,000 profit was decided and in spite of strenuous Government argument that he denied being there and not knowing the conspirators for the single reason that he had to do so to conceal his guilt -- indicates that the jury followed the trial court's instruction to "to choose between witnesses to determine the case and its outcome" (*supra*, p. 7) and chose to believe appellant.

The Court below erred in refusing to grant the defense motion to dismiss on the previously asserted grounds of collateral estoppel when that motion was renewed at the close of the prosecution's case. Accordingly, the judgment should be reversed and the indictment dismissed.

## POINT III

## THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW ON COUNT FOUR

The only proof below that appellant testified falsely when he denied knowing Gugliaro was the F.B.I. photograph showing a number of people, including appellant and Gugliaro, leaving a catering hall in Brooklyn in 1965. The picture showed "a number of people walking in one direction with Mr. Tramunti...someone else was second and Mr. Gugliaro was third. They were not looking at one another..." (*supra*, p. 15 ) The agent who took the picture did not see them speak to one another or go away together.

The fact that the two men left a large social hall at the same time does not establish that they were together at the same affair.* Drawing the inferences most favorable to the Government, the picture is some proof that they might have been introduced to one another inside. It does not provide any proof that appellant had reason to remember meeting Gugliaro if such an introduction did occur. The evidence on this count was legally insufficient and the count should not have been submitted to the jury. *US v. Clizer*, 464 F.2d 121, 125 (9th Cir., 1974)

*The Government failed to prove that the Colombo wedding was the only affair at the catering hall that night.

## POINT IV

THE GOVERNMENT'S USE OF ONE WITNESS WHO IDENTIFIED THE APPELLANT AND THE FAILURE TO DISCLOSE THAT TWO OTHER WITNESSES INTERVIEWED IN THE SAME CIRCUMSTANCES FAILED TO IDENTIFY HIM VIOLATED DUE PROCESS OF LAW.

Gilbert Dragani was called as a prosecution witness to testify that he saw the appellant in Michael Hellerman's office sometime in 1970 at the At Your Service Leasing stock closing. (TR 107-12) Dragani became a witness in this trial in the following fashion: James Schreiber, who contemplated calling Dragani as a witness in another criminal case (the AYSL trial)(33a) showed Dragani a spread of photographs and he identified appellant's picture. (35a) When this occurred Mr. Schreiber "immediately asked Mr. Dragani to step outside and I tried to reach [Mr. Naftalis]." (35a) When Mr. Naftalis proved unavailable, Mr. Schreiber told Mr. Rakoff "to get in touch with [Mr. Naftalis] immediately." (35a) When they spoke to one another Schreiber told Naftalis that he thought he had a witness who could help them, as he could put appellant in Hellerman's office. (37a-38a) Mr. Naftalis and Mr. Rakoff "were very excited about that news" and went to Schreiber's office "immediately." (38a)

Mr. Schreiber had shown the same spread of photographs to at least two other witnesses--Andrew Nelson and Donald Fisher. "Neither identified the picture of Tramunti." (200a)* Mr. Schreiber never communicated this information to anyone.

*When Nelson later responded to a letter sent him by defense counsel he stated: "I do not remember seeing Mr. Tramunti at the closing of AYSL at Mr. Hellerman's office." (237a)

At the AYSL trial where defendant's trial attorney in this case happened also to represent another defendant in that one, Andrew Nelson testified he was at Hellerman's office for the stock closing in 1970. (AYSL 2730)* On October 22, (the same day that Dragani saw the photographs) Nelson was shown a spread of photographs by Mr. Schreiber and asked to identify anyone he could recognize. (AYSL 2733) The picture of Tramunti was in that spread. (197a) Nelson stated he was handed the pictures and asked "Do you recognize anybody in this stack?" (AYSL 2742). He was not told who or what the group of pictures represented. (AYSL 2753) Nelson did not recognize Tramunti's picture. Although the Government initially implied that Nelson's failure to identify appellant was because he did not physically observe anyone in the other rooms as Dragani had done (200a), Nelson testified he saw a man named Lombardo (a defendant in AYSL whose picture he identifed from the spread) on the day of the closing "sitting in the anteroom." (AYSL 2730)

Mr. Schreiber's description of his reaction upon learning that Dragani recognized Tramunti demonstrates that the obvious value of this evidence to the prosecution case was immediately apparent to him. He wasted no time in imparting it to Mr. Naftalis, even though he knew his own trial preparation would be disrupted. (36a) It is inconceivable either that Mr. Schreiber did not experience a similar reaction upon learning that Fisher nor Nelson--who were at the same closing and whom he

*The AYSL minutes referred to will be submitted to the Court as an exhibit in this case.

interviewed on the same day--did not recognize appellant, or that the obvious value of this evidence to the defense case escaped him.

As the Government was able to argue in summation, Dragani was a different kind of witness than Hellerman and company, since:

> "Mr. Dragani doesn't have the slightest idea of what this case is about, and that is really significant. He doesn't even know Tramunti's name. Dragani did not volunteer to be a witness at this case; he came to this office to speak to another United States Attorney, Mr. Schreiber, about another case, his case, the At-Your-Service case, and while he is there in connection with that case there is a whole bunch of pictures spread on Mr. Schreiber's desk and he is showing him those in connection with that case and one of the pictures is of Tramunti and he says, "I know that man. I saw him at Hellerman's office," and all of a sudden, as he told you, he is subpoenaed. He doesn't know what the case is about. He comes in here and doesn't he supply the icing on the cake? From his testimony alone you could find the defendant guilty of one count of perjury in this indictment, his denial that he knew Michael Hellerman." (142a)

Without the information on Nelson and Fisher which was not disclosed by Mr. Schreiber, defense counsel had no ability whatsoever to alter the picture of Dragani as a thoroughly credible, thoroughly certain, and thoroughly reliable witness for the prosecution. If the evidence had been turned over, serious doubt could have been cast on the accuracy of Dragani's identification. As was observed in *United States v. Polisi*, 416 F.2d 573, 479 (2nd Cir. 1969), defense counsel's only hope was to discredit the witness, yet without the withheld evidence, counsel could only develop minor points of impeachment.* The Rule 33 motion after

*The Government also very astutely pointed this out to the jury in summation. (142a)

verdict was based, in part, upon the failure to disclose the Nelson-Fisher information to the defense.

Despite this showing, the District Court denied any relief, refusing even to hold a hearing, on a variety of grounds, which we believe are not appropriate in this case. (225-231a)

Nelson wrote* that he could not recall seeing appellant at the AYSL closing in Hellerman's office. His trial testimony showed Nelson was able to see and to remember another man, Lombardo, who was not at the actual closing but who sat outside in another room. That Nelson's failure to identify appellant had the same significance to the defense as Dragani's identification of appellant had to the prosecution was explicitly recognized by the Supreme Court in *United States v. Ash*, 413 U.S. 300, 318-319 (1973):

> "Selection of the picture of a person other than the accused, or *the inability of a witness to make any selection*, will be useful to the defense in precisely the same manner that the selection of a picture of the defendant would be useful to the prosecution." (emphasis added)

The court in *Ash* held there was no constitutional right to have defense counsel present at photographic showings. However, since the Court acknowledged the usefulness to the defense of a witness' inability to make an identification during such an identification procedure, the clear implication of the decision is that prosecution has the obligation to disclose this to the defense if and when it does occur. Since there is no defense right to be

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**Nelson refused to be interviewed by defense counsel, indicating that all communications should be conducted through his attorney by letter.

present at photographic identifications, the only way this useful information can come to the defense is if the prosecutor is obligated to make such a disclosure*.

It is clear that Mr. Schreiber recognized the high value to the prosecution in this case of Dragani's identification. He had knowledge that two other witnesses, also present at the closing did not identify the appellant. He did not disclose this even though the only way the information--which is of the same value to the defense as is a positive identification to the prosecution--could have come to the defense was by his making the same disclosure to defense counsel as he made to his fellow prosecutor. Since the defense has no right to be present when photo spreads are shown, then the only way to insure that the defense receives information useful to it gained thereby is to require the prosecution to make complete, not selective, disclosure of what occurred when the photographs were shown.

Dragani was an extremely valuable witness to the prosecution. By the prosecutor's own statement in summation, he was in an altogether different category than all the other witnesses called in this case. By bringing in a witness who had no connection with the Imperial Stock fraud, the prosecution was able to bolster the credibility of each witness who was shown to have a strong motive to testify for the Government. Thus Dragani's testimony had impact on each count, and not only upon the count which his testimony directly bore.

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*Under the *Giglio* rationale, it is not significant that Mr. Schrieber, rather than Mr. Naftalis had the information, and in fact the instant case is even stronger than *Giglio* since Mr. Schreiber appeared in the court below and testified on the very issue of Dragani's photograph identification.

When information is of obvious high significance to an accused in planning and conducting his defense, the failure of the prosecutor to inform defense counsel of the facts amounts to such fundamental unfairness as to be a denial of due process. "A new trial is required where the prosecution's failure to disclose was a considered decision for the sake of obstruction, or where the value of the evidence to the accused could not have escaped him." *United States v. Polisi*, *supra*, 416 F.2d at 577; *Ashley v. Texas*, 319 F.2d 80, 85 (5th Cir., 1964); *Jackson v. Wainwright*, 390 F.2d 284 (5th Cir., 1968); *Application of Kapatos*, *supra*; *United States ex rel Meers v. Wilkins*, 326 F.2d 135, 139 (2nd Cir., 1964).

*Meers*, *Kapatos*, and *Jackson v. Wainwright*, *supra*, are all cases where information which would have cast doubt upon another witness' identification of the defendant was not turned over to the defense. In *Levin v. Katzenbach*, 363 F.2d 287 (D.C. Cir., 1966), the non-disclosed information could have cast doubt upon a prosecution witness' testimony that he had changed thirty-five $1000 bills into smaller bills to give to the defendant. See also *Thompson v. Dye*, 221 F.2d 763 (3rd Cir., 1955), *cert. den.* 350 U.S. 875, where the prosecutor called various witnesses who testified the defendant was sober, and neglected to mention a witness who had stated he thought the defendant was drunk. In each of these cases the courts granted relief, recognizing that the obvious value of the information to the defense put the prosecutor under a duty to disclose it.

The prosecutor's duty to disclose that witnesses it interviewed *ex parte* were unable to make an identification is not fulfilled by merely disclosing the names of all the witnesses who were present when the event occasioning the identification occurred. *Jackson v. Wainwright*, *supra*, 390 F.2d at 298:

> "The State urges that it met its duty when it revealed Mrs. Elberty's name and address to the defendant's attorney before the trial and by subpeona produced her at the trial. But the attorney had not been given a hint as to the exculpatory character of Mrs. Elberty's description of the attacker; the information that she could identify the girl but not the man would tend to make her an undesirable witness for the accused. The prosecution's partially truthful disclosure amounted to affirmative misrepresentation. A defense lawyer cannot be expected to assume that a witness subpoenaed by the State, even if not called to testify, has evidence favorable to the defense."

In *United States v. Brawer*, 482 F.2d 117 (2nd Cir. 1973), this Court was also unimpressed with the Government's argument that since the defense knew the names and addresses of certain Canadian witnesses who may have possessed exculpatory information, that this negated any further duty to disclose by the Government. While two of the defendants knew of the existence of these witnesses, none of the defendants had any way of knowing what these witnesses could testify to if called. 482 F.2d at 135.

In this case, defense counsel was not present when Nelson and Fisher failed to identify appellant from the same spread shown to Dragani and had no reason to assume that they were shown the spread and failed to make the identification. Mr. Naftalis, who was the recipient of the Dragani information from Mr. Schreiber, also apparently never thought to ask Mr. Schreiber whether he had

shown the photo spread to other persons present at the closing and whether they could or could not identify appellant. Since Mr. Naftalis was not faulted for failing to ask Mr. Schreiber whether Nelson or Fisher or any other AYSL witness shown the pictures had failed to identify appellant, defense counsel cannot be held to a waiver for failing to ask the same question.* Quite obviously, neither Mr. Naftalis nor defense counsel could be expected to assume that Mr. Schreiber had revealed only the evidence which could help the prosecution, and had failed to produce other relevant evidence which might have created a reasonable doubt for the defense. *United States v. Zborowski*, 271 F.2d 661, 668 (2nd Cir. 1959).

It should be noted in this respect that on October 23, defense counsel had made a Brady request for any material coming from interviews with witnesses "reflecting negative results of the Government in its effort to show Hellerman was with or seen with or met with Tramunti on any occasion..." Certainly the Nelson-Fisher interviews fall within the ambit of this request. If there is any doubt as to the Government's duty to reveal the information because its value to the defense was so obvious, then under *Kyle-Keogh*** line of cases, the defendant's right to due process was violated because the Government failed to disclose such evidence after a defense request.

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*The fact that defense counsel in summation commented on the prosecutor's failure to call the other persons at the closing to corroborate Dragani cannot be construed as a waiver. Since the facts had not been disclosed to him, counsel had no other argument he could make to discredit Dragani.

**_Kyle v. United States_, 297 F.2d 907 (2nd Cir., 1961) _cert. den._ 377 U.S. 909; _United States v. Keogh_, 391 F.2d 138 (2nd Cir., 1968)

In the *Zborowski* case, supra at 668, the Court observed:

> In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution towards insuring a conviction.

This was a principle which the Government, unfortunately, failed to abide by in this case.

We submit that under the authorities cited, the conceded facts that Nelson and Fisher were present at the closing, were shown the same photographs as Dragani, and failed to identify defendant, coupled with Mr. Schreiber's conduct in disclosing favorable evidence to his fellow prosecutor while withholding information of precisely the same genre from the defense, plus the defense request for disclosure of materials of this nature, are a sufficient showing to establish that the defendant was denied a fair trial and due process of law. Alternatively, under *United States v. Brawer, supra*, a hearing should be ordered on this point as was requested below.

## POINT V

### IT WAS ERROR TO PERMIT THE GOVERNMENT TO VOUCH FOR THE CREDIBILITY OF ITS WITNESSES, BY EVIDENCE THAT UNDER THEIR AGREEMENT WITH THE GOVERNMENT THE WITNESSES WERE OBLIGATED TO GIVE ONLY TRUTHFUL TESTIMONY.

Both Hellerman and Kelsey had agreements with the Government providing for outright dismissal of criminal charges or reduced sentences in return for their cooperation. The existence of the agreements had to be disclosed to the jury and this was done. Kelsey was permitted to testify on direct that his agreement with the Government was "null and void" if he failed to tell the truth. (250a-251a) Hellerman was asked a series of questions by the prosecutor which clearly put before the jury that his agreement with the Government was dependent upon his being truthful and honest in his testimony.* (238a-239a)

In support of his motion for a mistrial defense counsel argued:

> "MR. GOLDBERG: ...I think when the government is permitted to say or elicit from a witness that he has a deal, provided he tells the truth and doesn't perjure himself, by the placement of that witness on the stand, the government in effect improperly intrudes its own credibility and prestige behind the witness. It tends to suggest an earlier determination by the government that he is testifying truthfully, and I might say, with all due respect, while of course I know the court is not bound by Judge Edelstein, in United States v. Dioguardi, the same argument was adopted by Judge Edelstein, and it intrudes into the case an element of the government's prior determination that this man is being truthful.
>
> THE COURT: I don't think that. When somebody asks what the deal is, then I think the deal ought to be entirely spread upon the record..." (252a-253a)

*The trial court refused to permit the defense to prove that Hellerman's testimony had resulted in at least one acquittal and hence, even though the Government believed Hellerman, the jury in that case did not. (248a-249a)

Any witness who takes the stand to testify under oath has the legal and moral obligation to tell the truth. Any party calling a witness has an obligation not to put a witness on the stand unless he believes the witness is telling the truth. It was therefore totally unnecessary for the Government to expressly condition the bargain with these witnesses upon the receipt of truthful testimony. Not only was it unnecessary, it was also totally improper because the only function served by this provision of the agreement was to convey to the jury the Government's belief in the veracity and good faith of these witnesses.

The Government cannot support the credibility of its own witnesses or place its authority behind their testimony by conveying to the jury a belief the witness is telling the truth. *United States v. Puco*, 436 F.2d 1062, 1068 (2nd Cir., 1970); *United States v. Grunberger*, 431 F.2d 1062, 1068 (2nd Cir., 1970).

Once the Government places before the jury the fact that a witness has been called only after the witness has promised the Government to tell the truth, this implies that this witness has a special claim to veracity different from all other witnesses who take the oath. This improper implication was driven home to the jury by questions put to Kelsey by the prosecutor. For not only was the Government permitted to show Kelsey and Hellerman had specifically promised to testify truthfully, Kelsey was allowed to testify that although he had lied before he became a government witness, since that time he had been called by the Government in three trials. (254a-255a) Although defense objection

was sustained when Kelsey was asked whether he lied at those trials, this exchange still took place before the jury:

"MR. RAKOFF: And since then, since you agreed to cooperate with the Government, having testified--have you testified in several trials?

A. Yes.

Q. How many in all?

A. I believe three times.

Q. Including this trial?

A. No, this I think was the fourth.

Q. Have you told any lies --

MR. GOLDBERG: I object to that.

THE COURT: Sustained. Disregard the question."(255a)

The picture the Government attempted to convey to the jury was that these witnesses could be believed because they had a pact with the Government specifically conditioned upon the giving of truthful testimony.

This was especially unfair because under the Government's agreement with Hellerman and Kelsey there was no provision that the issue of their truthfulness be decided by an independent body--they got their bargain as long as the prosecution was convinced they did not lie, even though a jury might have disbelieved their testimony.*

The judgment appealed from should be reversed because the Government was permitted to vouch for the credibility of its witnesses in an improper manner, and because, on the record in this case, the error cannot be disregarded as harmless.

*See supra, p. 58, footnote, where the defense was precluded from proving that Hellerman's testimony failed to convince a jury in another case and yet the Government continued to call him as a witness.

## CONCLUSION

FOR ALL THE FOREGOING REASONS, THE JUDGMENT APPEALED FROM MUST BE REVERSED.

Respectfully submitted,

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